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24 **UNITED STATES DISTRICT COURT**
25 **NORTHERN DISTRICT OF CALIFORNIA**
26 **SAN JOSE DIVISION**

27 TEVA PHARMACEUTICALS USA, INC.,

28 Case No. 5:24-cv-03567-BLF

29 Plaintiff,

30 Honorable Beth Labson Freeman

31 vs.

32 **DEFENDANTS' REPLY IN SUPPORT OF**
33 **JOINT MOTION TO STAY DISCOVERY**
34 **PENDING RESOLUTION OF THEIR**
35 **FORTHCOMING JOINT MOTION TO**
36 **DISMISS**

37 CORCEPT THERAPEUTICS, INC., et al.,

38 Defendants.

39 Hearing Date: January 2, 2025 at 9:00 a.m.

1 **I. PRELIMINARY STATEMENT**

2 Defendants' motion to stay (Dkt. 47, "Mot.") demonstrated that their forthcoming pleading
 3 stage arguments are potentially dispositive of Teva's entire case and can be decided with no
 4 discovery. Nothing in Teva's opposition (Dkt. 49, "Opp.") suggests otherwise. Indeed, Teva does not
 5 dispute that its first amended complaint (Dkt. 39, "FAC") changed little from its initial complaint.
 6 Thus, the Court can properly look to the arguments raised in Defendants' prior dismissal motions
 7 (Dkts. 34, 36) to evaluate whether a stay is now appropriate (as this Court did when staying discovery
 8 in *In re Google Digital Advert. Antitrust Litig.*).

9 Teva's opposition mostly ignores Corcept's arguments and authorities. Instead, Teva attacks
 10 strawmen positions, misstates the law, and improperly and prematurely tries to litigate the merits of
 11 Defendants' motion to dismiss. But these arguments miss Defendants' key point: there is no downside
 12 to a short stay of discovery while the Court decides the viability of Teva's claims, but significant
 13 potential harm to Defendants if the Court opens the floodgates of discovery before it is clear whether
 14 *any* of this case can proceed. Discovery in antitrust cases is notoriously burdensome, and Teva makes
 15 clear *in this case* that it is eager to seek expansive and competitively sensitive discovery going back
 16 years and years, exposing Corcept's commercial strategies to a rival, and chilling Defendants' First
 17 Amendment rights. Indeed, Teva on October 3—before the parties have even held a Rule 26(f)
 18 conference—served **231 document requests** seeking documents and data going back to as early as
 19 **February 2012**. Exs. A-B, Stone Decl. Accordingly, because Defendants meet the requirements for
 20 a limited stay of discovery and such a temporary stay will promote efficiency and judicial economy
 21 with no prejudice to Teva, Defendants respectfully request that the Court stay discovery pending the
 22 resolution of Defendants' forthcoming motion to dismiss.

23 **II. ARGUMENT**

24 **A. Corcept's Motion to Dismiss Is Potentially Case-Ending**

25 As this Court has explained, "[o]n a motion to stay discovery," "the question is only whether
 26 [Defendant's] motion to dismiss is '**potentially** dispositive of the entire [case].'" *Reveal Chat Holdco,*
 27 *LLC v. Facebook, Inc.*, 2020 WL 2843369, at *3 (N.D. Cal. Apr. 10, 2020). Teva misstates how courts
 28 take a "preliminary peek," and wrongly asks the Court to go well beyond that inquiry. Opp. at 2–9.

1 Contrary to Teva’s contentions, this Court has squarely rejected the notion that it must engage
 2 in a full-blown, substantive analysis of the strength of an underlying motion to dismiss when
 3 evaluating a discovery stay request. In *Reveal Chat*, this Court explained that a plaintiff’s “attempt to
 4 grapple with the merits” of a defendant’s “motion to dismiss to demonstrate that [the defendant’s]
 5 arguments are not case-dispositive” is improper. *Reveal Chat*, 2020 WL 2843369, at *3 (Freeman,
 6 J.). In *Tavantzis v. Am. Airlines, Inc.*, this Court likewise held that “the Court need not decide whether
 7 [a defendant] will ultimately prevail on the motion” to dismiss. 2024 WL 812012, at *2 (N.D. Cal.
 8 Feb. 23, 2024) (Freeman, J.). And in *Yiren Huang v. Futurewei Techs., Inc.*, this Court explained that
 9 a “substantive analysis” of a defendant’s motion to dismiss “would be premature” at the discovery
 10 stay stage. 2018 WL 1993503, at *3 (N.D. Cal. Apr. 27, 2018) (Freeman, J.).

11 Teva nonetheless asserts Defendants must, at this procedural stage, “convince the Court that
 12 Teva will be unable to state a claim for relief.” Opp. at 3 (cleaned up). But Teva’s cited cases do not
 13 require that showing. In *Reveal Chat* and *SVB Fin. Grp. v. Fed. Deposit Ins. Corp.*, this Court—citing
 14 *Wenger v. Monroe*, 282 F.3d, 1068, 1077 (9th Cir. 2002)—merely noted that a strong showing on the
 15 merits is but one circumstance in which “[g]ood cause for staying discovery **may** exist.” 2020 WL
 16 2843369, at *1; 2024 WL 1898439, at *1 (N.D. Cal. Apr. 29, 2024). In other words, such a showing
 17 on the merits is a sufficient, but not necessary, ground for a stay. Indeed, were Teva’s argument
 18 correct, then this Court’s explanations in *Reveal Chat*, *Yiren*, and other cases that substantive analyses
 19 of motions to dismiss are premature at the discovery stay stage would make no sense. And while Teva
 20 cites the opinion of another district court in *Arellano v. Calderon*, that is not the standard this Court
 21 has applied in evaluating stay requests, *Arellano* concerned a motion for summary judgment (not a
 22 motion to dismiss), and the *Arellano* court itself noted that at the stay stage, “the court does not pre-
 23 judge the outcome of the underlying motion.” 2023 WL 4568772, at *2 (S.D. Cal. July 14, 2023).

24 Teva also incorrectly claims that a discovery stay is only appropriate where the movant
 25 essentially shows a Rule 11 violation. Opp. at 3. This Court’s decisions have rejected that standard,
 26 which would make the standard for a discretionary stay frivolity, which is **higher** than what is required
 27 for dismissal (implausibility/failure to state a claim). Contrary to Teva’s suggestion, *Optronic Techs.,*
 28 *Inc. v. Ningbo Sunny Elec. Co.*, did **not** hold a defendant must establish a plaintiff’s complaint is

1 frivolous or filed for an improper purpose. Instead, the court expressed doubts about the dismissal
 2 arguments' ultimate strength, but then found the defendant had "superficially *satisfied*" the first step
 3 because "the pending motion to dismiss could be dispositive of the entire action." 2018 WL 1569811,
 4 at *1 (N.D. Cal. Feb. 16, 2018). The same is true of *Barrett v. Apple Inc.* 2020 WL 13815568, at *2
 5 (N.D. Cal. Oct. 22, 2020) (first step of stay test "*superficially satisfy[ed]*"). Thus, Teva's own cases
 6 negate its arguments and show that the question is the motion to dismiss's potential effect; not its
 7 ultimate strength.

8 Finally, Teva is incorrect that a stay is unwarranted because it has not yet filed its opposition
 9 to Defendants' forthcoming motion to dismiss and/or it might possibly obtain leave to amend. Opp.
 10 at 3, 9. As to the former, Teva's argument would mean that a defendant could never obtain a stay of
 11 discovery if it files its stay motion at the same time as its motion to dismiss. That is wrong. *See Reveal*
 12 *Chat*, Case No. 20-cv-00363-BLF (N.D. Cal.), Dkts. 25, 26, 31, 41 (staying discovery before plaintiff
 13 filed opposition to motion to dismiss). In fact, this Court has granted motions to stay discovery before
 14 a defendant has even filed a renewed motion to dismiss. *See In re Google Digital Advert. Antitrust*
 15 *Litig.*, 2020 WL 7227159, at *2 (N.D. Cal. Dec. 8, 2020) (Freeman, J.) (staying discovery where
 16 plaintiffs amended complaint after defendant moved to dismiss and stay discovery and before
 17 defendant filed renewed motion to dismiss). As to amendment, this Court often stays discovery
 18 pending the resolution of a motion to dismiss notwithstanding that leave to amend may be given.
 19 *Reveal Chat*, 2020 WL 2843369, at *3; *In re Nexus 6p Prod. Liab. Litig.*, 2017 WL 3581188, at *2
 20 (N.D. Cal. Aug. 18, 2017). In any case, by filing the FAC in response to Defendants' prior dismissal
 21 motions, Teva has now used up its free amendment, thereby acknowledging the deficiencies in its
 22 allegations—deficiencies that were not corrected by its substantially similar amended complaint.

23 **B. Teva Fails to Establish that Defendants' Motion to Dismiss Requires Discovery**

24 Defendants have also established that their forthcoming motion to dismiss can be decided
 25 without discovery. Mot. at 8. Teva makes only a half-hearted attempt to challenge Defendants'
 26 showing on grounds that Defendants "merely assert" they meet the second step and that their motion
 27 to dismiss in fact "raise[s] a host of fact-intensive inquiries[.]" Opp. at 9–10.

28 Far from resting on empty assertions, Defendants' stay motion and their prior dismissal

1 motions detailed that Teva fails to state any claims based on: (1) Teva’s own allegations; (2)
 2 documents Teva cites and thus incorporates by reference (like the FDA letter, Corcept-Optime
 3 contract, and Boyd article regarding practitioner payments); and (3) facts subject to judicial notice
 4 (such as information on Teva’s own and government websites). Defendants’ forthcoming dismissal
 5 motion will rely on the same materials and the same authorities confirming that the Court can properly
 6 consider them at the pleading stage. Teva does not even mention, much less refute, Defendants’ cited
 7 support for considering these materials now—*e.g.*, *In re German Auto. Mfrs. Antitrust Litig.*, *E&J*
 8 *Gallo*, *Ferraro*, and *Khoja*—essentially conceding the Court can consider these materials and resolve
 9 Defendants’ motion to dismiss without discovery. Teva’s only response is to state “granting a stay on
 10 such a basic notion is unwarranted.” But Teva’s only cited case, *Optronic*, merely holds that a court
 11 should not grant a stay *solely* because no discovery is required to resolve a motion to dismiss. 2018
 12 WL 1569811, at *2. Defendants’ stay motion is not so limited; it shows the motion to dismiss can be
 13 resolved without discovery, *and* that the motion to dismiss potentially disposes of the entire case, *and*
 14 case-specific equitable considerations that weigh against discovery. *Optronic* is thus inapposite.

15 C. Teva Fails to Grapple with the Equitable Considerations Supporting a Stay

16 Defendants’ stay motion explained that good cause and equitable considerations support a
 17 limited stay of discovery. Mot. at 8–10. Teva dismisses these showings as “boilerplate
 18 observation[s].” Opp. at 10. Teva simply closes its eyes to Defendants’ motion and the law.

19 *First*, while the Ninth Circuit and this Court have all noted antitrust discovery is extremely
 20 time-consuming and costly, thus justifying discovery stays, Mot. at 8, Defendants do not rely merely
 21 on this general proposition. Rather, in this specific case, Teva asserts a hodgepodge of theories related
 22 to Orange Book listings, “sham” litigation, “exclusive dealing,” and speaker fee payments to
 23 practitioners that in many cases go back at least 10 years (which is why the claims are untimely) and
 24 implicate, *inter alia*, an enormous amount of litigation-related material, which will be hugely
 25 expensive to review, including due to the need to sort between legitimately-discoverable and
 26 privileged material (particularly given the nature of Teva’s claims, which potentially implicate
 27 Corcept’s communications with counsel). Highlighting the breadth of this discovery, Teva has just
 28 served **139 document requests** on Corcept and **92 document requests** on Optime seeking materials

1 going back as early as 2012 and covering each of its theories (and more). Exs. A, B.

2 Teva’s opposition grapples with none of these points, and its cited cases are all inapt. *See In*
 3 *re Lithium Ion Batteries Antitrust Litig.*, 2013 WL 2237887, at *2–3 (N.D. Cal. May 21, 2013) (no
 4 motion to stay pending motion to dismiss, no operative complaint even on file); *Singh v. Google, Inc.*,
 5 2016 WL 10807598, at *2 (N.D. Cal. Nov. 4, 2016) (defendants “fail[ed] to identify **any** discovery
 6 burdens” or “particular or specific facts”). Teva’s suggestion that a discovery stay is only warranted
 7 in antitrust MDL or class action litigation (Opp. at 10) is also wrong. *See Realtek Semiconductor*
 8 *Corp. v. MediaTek, Inc.*, 2024 WL 1975478, at *10–11 (N.D. Cal. May 3, 2024) (staying discovery
 9 in non-MDL, non-class action, competitor-to-competitor antitrust case).

10 **Second**, Defendants’ motion explained that a stay of discovery pending the resolution of their
 11 motion to dismiss is appropriate because Teva and Corcept are competitors; Defendants’ motion to
 12 dismiss raises immunity (*Noerr-Pennington*) defenses; and discovery would impinge on Corcept’s
 13 sensitive business strategies and constitutional right to petition the courts for redress. Teva nowhere
 14 denies that these equitable considerations favor a stay. Instead, it says only that these concerns can be
 15 addressed “by a protective order.” Opp. at 10. For one, no protective order has been entered in this
 16 case. Nor does a protective order safeguard Corcept from having to provide discovery to a rival in the
 17 first place, which itself chills its First Amendment rights and development of competitive strategies.

18 **Finally**, Teva’s claims of “prejudice” from a limited stay are all baseless. While Teva states
 19 that it seeks “injunctive relief,” it did not move for a preliminary injunction; it withdrew its original
 20 complaint, showing no heightened urgency; any permanent injunction is highly in doubt and, at best,
 21 years away; and a limited stay does not affect any case management schedule, which the Court has
 22 not even set. While Teva speculates evidence may “be lost, destroyed, or altered,” it points to no
 23 preservation issues in *this* case. And while Teva claims a stay will prevent it from “obtaining
 24 discovery to file more detailed allegations,” Teva has now already used up its free amendment. In any
 25 case, the Ninth Circuit has rejected Teva’s argument it can use discovery as a fishing expedition before
 26 stating valid claims. *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987).

27 **III. CONCLUSION**

28 Defendants respectfully request a discovery stay pending resolution of their motion to dismiss.

1 DATED: October 4, 2024
2

3 By: /s/ Robert W. Stone
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-6- Case No. 5:24-cv-03567-BLF
DEFENDANTS' REPLY IN SUPPORT OF RENEWED MOTION TO STAY DISCOVERY

1 **CIVIL LOCAL RULE 5-1 ATTESTATION**

2 I, Robert W. Stone, am the ECF user whose credentials were utilized in the electronic filing
3 of this document. In accordance with Civil Local Rule 5-1(i)(3), I hereby attest that concurrence in
4 the filing of this document has been obtained from each of the signatories listed above.

5
6 DATED: October 4, 2024

7
8 By /s/ Robert W. Stone
9 Robert W. Stone

10
11 **CERTIFICATE OF SERVICE**

12
13 I hereby certify that on this 4th day of October 2024, I electronically transmitted the foregoing
14 document to the Clerk's Office using the CM/ECF System, causing it to be electronically served on
15 all attorneys of record.

16
17 By /s/ Robert W. Stone
18 Robert W. Stone